

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

ALLAN A. PETERSON,

Plaintiff,

v.

Civil Action No. 5:06CV106
(STAMP)

BRIAN PRICE, MICHELLE SPEARS,
DOMINIC A. GUTIERREZ, SUSAN
McCLINTOCK, MAVIS HOLYFIELD,

Defendants.

**ORDER OF CLARIFICATION REGARDING CERTIFICATE
OF APPEALABILITY AND NOTING APPARENT
UNTIMELINESS OF NOTICE OF APPEAL**

The pro se plaintiff's notice of appeal was received by the United States Court of Appeals for the Fourth Circuit on December 7, 2007 and was forwarded to this Court for appropriate disposition pursuant to Federal Rule of Appellate Procedure 4(d). On December 21, 2007, this Court received the notice of appeal which seeks leave to file an appeal of this Court's September 28, 2007 memorandum opinion and order affirming and adopting the reports and recommendations of the magistrate judge, granting the defendants' motion to dismiss, or in the alternative for summary judgment, and dismissing the plaintiff's civil rights complaint with prejudice. That opinion and order erroneously included language indicating that a certificate of appealability is required for appeal in this case. A certificate of appealability is required only for habeas corpus proceedings. Fed. R. App. P. 22. Because this is a civil rights case, no certificate of appealability is necessary here.

Nonetheless, the plaintiff's notice of appeal is untimely pursuant to Federal Rule of Appellate Procedure 4(a). Under Rule 4(a), a plaintiff in a civil case must file a notice of appeal within 30 days after the entry of judgment. Judgment in this case was entered on September 28, 2007. The plaintiff did not file his notice of appeal until December 7, 2007,¹ over sixty days later. Additionally, the December 3, 2007 postmark on the envelope containing the notice of appeal indicates that the plaintiff did not timely deposit the notice of appeal in the mail. Finally, the plaintiff did not file a motion for extension of time to file a notice of appeal nor has the plaintiff made any showing of excusable neglect or good cause.

IT IS SO ORDERED.

The Clerk is directed to transmit a copy of this order to the plaintiff and counsel of record herein.

DATED: January 4, 2008

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE

¹ Pursuant to Federal Rule of Appellate Procedure 4(d), if a notice of appeal is mistakenly filed in the court of appeals, the notice is considered filed in the district court on the date it was received in the court of appeals.